

## Pierce County

Office of Prosecuting Attorney

REPLY TO:

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June 22, 2016

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(via [caa@wsba.org](mailto:caa@wsba.org))

**Re: ODC File No. 16-00748**

**Preliminary Response to Grievance by John Cain against Pierce  
County Prosecutor Mark Lindquist and DPA Jared Ausserer**

Dear Ms. Congalton:

Pierce County Prosecutor Mark Lindquist and Deputy Prosecutor Jared Ausserer have asked me to respond to your May 13, 2016 letter regarding the above-referenced grievance, which alleges violations of RPC 3.6 and 3.8 when Prosecutor Lindquist participated by telephone in an interview on the Nancy Grace program during the trial of Skylar Nemetz.

So far as we know, neither Mr. Nemetz nor anyone representing him has submitted such a grievance. Mr. Cain, on the other hand, has filed bar complaints against numerous attorneys in the Pierce County Prosecuting Attorney's Office, has written numerous letters criticizing the Pierce County Prosecuting Attorney's Office, and supported a failed political recall of Prosecutor Lindquist. His animus towards the Pierce County Prosecuting Attorney's Office is a matter of record, as is his unfortunate willingness to manipulate the record to create misleading and false impressions designed to support his political attacks.

A prominent example of this tendency occurs on page 3 of the grievance. Mr. Cain quotes RPC 3.6 subsections (a) and (d), *but entirely omits RPC 3.6(b)*, perhaps because he is aware that RPC 3.6(b) eliminates the basis for Mr. Cain's complaint. RPC 3.6(b) states:

**(b) Notwithstanding paragraph (a), a lawyer may state:**

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

**(2) information contained in a public record;**

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

**(7) in a criminal case, in addition to subparagraphs (1) through (6);**

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation. (Emphasis added.)

“Information contained in a public record” is not defined, but should be broadly construed because, as stated in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054 (1991), there has been no “abandonment of our normal First Amendment principles in the case of speech by an attorney regarding pending cases.”

At the top of page 2 the grievance sets out a short exchange between Prosecutor Lindquist and host Nancy Grace, but makes no effort to argue that his comments disclosed information not already in the public record. They clearly did not.

The first exchange set out at page 2 of the grievance is as follows:

LINDQUIST: And that's the whole question. Was this an accident? Was it intentional? And that's why the defendant's experience with firearms is critical to the case. But it's not just that physical evidence, it's the behavior afterwards.

GRACE: Right.

In the criminal case, there never was a question that Nemetz held the weapon when it fired, killing his wife. The issue from the start was whether the discharge was accidental or intentional. The October 22, 2014 Declaration for Determination of Probable Cause - a public record filed with the court – makes this crystal-clear, alleging (on page 1 line 13) that the defendant “did commit the crime of murder in the first degree,” for which RCW 9A.32.030(1)(a) requires “premeditated intent.” The declaration alleged the shooting was intentional (and therefore necessarily not accidental). Prosecutor Lindquist’s first 3 sentences in the first exchange simply summarized the positions of the parties as already reflected in the public record.

The fourth sentence, stating “the defendant's experience with firearms is critical to the case,” is also reflected in the probable cause declaration, at page 2 lines 6.5 - 8.5:

Mr. Nemetz then described his familiarity with firearms. He said that he had been around firearms since he was 11 years old. He received additional training in the military. He said he was aware how to properly clear a rifle and described the appropriate manner to do so, which included a visual inspection of the chamber to ensure a round was not in the chamber. He gave no explanation as to why he did not clear the weapon as he had been trained.

In the second exchange quoted by the grievance, Respondent Lindquist then elaborated upon the “behavior afterwards” mentioned in the first exchange:

LINDQUIST: The defendant never called 911. He never called for help. He seemed more focused on cleaning up the scene, disposing of the liquor bottles ...

GRACE: Oh!

Here again, Prosecutor Lindquist was simply repeating information which was already in the public record. The probable cause declaration at page 2 lines 13.5 - 15.5 stated as follows:

Mr. Nemetz told detectives that after shooting his wife he knocked the magazine under the bed and threw the AR 15 into the closet. He said that he then flushed a bottle of cinnamon whiskey down the toilet. When asked why he took the time to do all of these things instead of offer aid to his wife or call 911, Mr. Nemetz was unable to provide a reason. No bottle of whiskey was recovered from the apartment.

Similarly, Respondent Jared Ausserer's December 31, 2015 affidavit supporting the State's response to a Knapstad motion to dismiss stated as follows at page 7 lines 2-9:

The defendant told detectives that after shooting his wife in the back of the head he realized that he had alcohol in the house and had to get rid of it because he was not 21 years old. So instead of rendering aid to his wife, the defendant threw the firearm in the closet, went to the kitchen and grabbed the alcohol that was on top of the refrigerator. He went to the bathroom and poured the alcohol down the toilet before taking the bottles to the back porch and throwing them into the brush. The neighbor below the defendant reported that she heard someone running above her and then the toilet flushed twice shortly before police arrived.

The remaining exchanges quoted by the grievance also simply repeat information already in the public record:

LINDQUIST: ...than getting help. And it's his actions combined with his statements...

GRACE: Behavioral evidence.

LINDQUIST: ... and his experience with firearms that add up to murder, rather than accident.

In short, in the exchanges quoted by the grievance, Prosecutor Lindquist did nothing more than articulate the prosecution's theory of the case, which had already been set out for months in the public court file. RPC 3.6(b)—the very subsection omitted by Mr. Cain from his grievance—clearly entitles Prosecutor Lindquist to speak publicly about information in the public record. Prosecutor Lindquist did exactly that. Consequently, there is no RPC violation and the grievance should be dismissed.

At the bottom of page 4, Mr. Cain's grievance transitions to RPC 3.8 "Special Responsibilities of a Prosecutor" and alleges that Prosecutor Lindquist violated subsection (f) concerning extrajudicial comments. Once again, however, Mr. Cain selectively quotes the relevant authority: at page 4, the grievance quotes part of Comment 5, but omits critical language at the end of the comment which cautions that RPC 3.8(f) does not abrogate RPC 3.6(b):

Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an

indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. **Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b)** or 3.6(c) (emphasis added).

Because the allegations were detailed in the Declaration of Probable Cause and other press coverage concerning it, there was no “substantial likelihood of heightening public condemnation of the accused.” RPC 3.8(f). As noted above, every statement Prosecutor Lindquist made to Ms. Grace had its source in the public record and therefore complied with RPC 3.6(b). Further, the portion of Comment 5 Mr. Cain elided from his grievance makes clear that the restrictions in RPC 3.8 are not intended to bar statements that comply with Rule 3.6(b). Because Prosecutor Lindquist’s statements complied with RPC 3.6(b), they complied with RPC 3.8<sup>1</sup>, and this portion of the grievance should be dismissed.

At page 6, Mr. Cain transitions again, alleging that Prosecutors Lindquist and Ausserer violated RPC 3.3 by allowing DPA Greer to misrepresent to the Court that Ausserer “was not involved in the decision to be on the Nancy Grace show.” Mr. Cain insinuates that the fact that Mr. Lindquist asked Mr. Ausserer to sit in on the interview with Ms. Grace means that Mr. Ausserer “made the decision” to be on the Nancy Grace show.

This, of course, is absurd. Prosecutor Lindquist made the decision to participate in the interview. DPA Ausserer had no role in that decision; to the contrary, his entirely appropriate role was to serve as a factual resource for Prosecutor Lindquist and to help Prosecutor Lindquist ensure that his comments stayed within the boundaries of the public record as required by RPC 3.6(b). To that end, Prosecutor Lindquist requested Mr. Ausserer provide him with the public filings in the case, including the Declaration for Determination of Probable Cause and the affidavit supporting the State's response to the Knapstad motion to dismiss. Prosecutor Lindquist reviewed these documents to ensure that any response he gave was restricted to statements in the public records. Indeed, in an abundance of caution, Prosecutor Lindquist requested that Mr. Ausserer remain in his office while he spoke telephonically to ensure the accuracy of his comments and their existence in the public record.

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<sup>1</sup> At page 5 of his grievance, Mr. Cain asserts that a violation of RPC 3.8 can be a violation of RPC 8.4. This argument fails for the simple reason that Prosecutor Lindquist did not violate RPC 3.8, rendering moot the theoretical question of whether a RPC 3.8 violation can also be considered a RPC 8.4 violation.

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As the above paragraph demonstrates, neither Mr. Ausserer nor Mr. Greer made any decisions regarding Prosecutor Lindquist's appearance on the Nancy Grace show. That decision belonged to Prosecutor Lindquist. For this reason, his allegation regarding RPC 3.3 should be dismissed.

The grievance's final allegation is that Prosecutor Lindquist violated RPC 4.1 when he allegedly said he was unfamiliar with the format of the Nancy Grace show. This makeweight allegation fails for a number of reasons. First, Prosecutor Lindquist said he does not watch the Nancy Grace show. That is a true statement. Prosecutor Lindquist does not watch the Nancy Grace program, just as he does not routinely watch television news (or television in general), even though he is frequently interviewed on such programs. Second, RPC 4.1 prohibits "false statements of material law or fact" and nothing could be less material than the dispute Mr. Cain seeks to orchestrate here, ie, Prosecutor Lindquist's description of his viewing habits (or lack thereof). This allegation should be denied, as should the entirety of the grievance.

In sum, Prosecutor Lindquist is a public official tasked with explaining to the public the work his office does. So long as he abided by RPC 3.6(b) (which he undeniably did), Prosecutor Lindquist had every right to be interviewed by the Nancy Grace show. The objections Mr. Cain lodges to Prosecutor Lindquist's appearance are political, not legal or ethical. They have no place in our Bar's grievance system, and his grievance should be summarily dismissed.

Sincerely,

*s/Denise Greer*

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DG:jaa